JAVAD SAFIKHANI v. PP

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
ZABARIAH MOHD YUSOF JCA
[CRIMINAL APPEAL NO: K-05-84-03-2015(IRN)]
22 JANUARY 2017

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence and conviction – Trafficking in dangerous drugs – Discovery of drugs in car boot – Identity of drugs – Contradictory evidence of prosecution witnesses – Whether contradictions explained – Whether there was break in chain of evidence – Failure to call material witnesses – Whether adverse inference under s. 114(g) of Evidence Act 1950 ought to be invoked – Whether conviction and sentence safe*

PW2 and six other police personnel, including PW4 were on duty in a police road block. At the said police road block, a taxi was detained. The appellant ('accused') was a passenger in the taxi. Upon inspecting the taxi, PW4 found two boxes of 'Kellogs Cornflakes' ('P15 and P16'), which were wrapped in cellotape in the boot of the taxi. It was suspected that the contents were drugs. P15 and P16 were then handed over to the PW6, the investigating officer. The accused was then charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was accordingly convicted and sentenced under s. 39B(2) of the Act by the Judicial Commissioner ('JC'). Aggrieved, the accused appealed. The accused submitted, *inter alia*, that the JC had: (i) erred when he failed to invoke the adverse presumption under s. 114(g) of the Evidence Act 1950 against the prosecution's case for failure to call two material witnesses; (ii) failed to appreciate that: (a) there was a break in the chain of custody of the suspected drug exhibits and the suspected drug exhibits have been tampered with; (b) there were doubts relating to the movement of the suspected drug exhibits which formed the subject matter of the charge; and (c) there was clear tampering of evidence which the prosecution failed to explain throughout the trial.

Held (allowing appeal; setting aside conviction and sentence)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The two witnesses who were also on duty at the police road block, were crucial and material for the prosecution's case. They would be able to shed light on the issue of what happened to all the boxes of items seized from the boot of the taxi at the material time. It was insufficient for the prosecution to just offer the witnesses to the defence. There was also no explanation at the prosecution's stage as to why these witnesses were not available or called as a witness. Failure to call these witnesses by the prosecution at the prosecution stage, created gaps in the prosecution's case which was fatal to the charge against the accused. Consequently, the

JC should have invoked an adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution's case. The JC erred when he did not do so. (paras 26 & 27)

(2) Despite doubts as to how many items seized were missing or what was missing, PW6 failed to do any investigation on the items that were 'missing' after it was seized from the accused. Hence, it was incredible as to how the prosecution could submit that there had not been any tampering in the exhibits tendered in court. The JC failed to take into account the aforesaid factors which were crucial as it raised doubts on the identity of the drugs that were finally produced in court and erred in not taking into account the serious gaps in the prosecution case. A maximum evaluation of the testimony of the prosecutions' witnesses (PW2, PW4 and PW6), especially PW4, created doubt on the credibility of the prosecution's witnesses and doubts on the identity of the exhibits, of which defence of the case should not have been called in the first place. (paras 33 & 34)

(3) The fact that some of the items were missing suggested that the exhibits had been tampered with. One could not discount the missing exhibits and conclude that P15 and P16 were not tampered with. The chain of custody of the exhibits had been questioned and the integrity of the contents of P15 and P16 had been compromised, indicating that it could have been tampered with. Clearly, the JC erred in his findings that there was no break in the chain of custody of the exhibits. (para 36)

Bahasa Malaysia *Headnotes*

PW2 dan enam anggota polis yang lain, termasuk PW4 bertugas dalam satu sekatan jalan polis. Ketika sekatan jalan polis tersebut, sebuah teksi ditahan. Perayu ('tertuduh') adalah seorang penumpang teksi tersebut. Berikutan pemeriksaan teksi tersebut oleh PW4 dua kotak ('P15 dan P16') 'Kellogs Cornflakes', yang dibungkus dengan pita selofan dijumpai di dalam but teksi. Kandungan kotak-kotak tersebut disyaki dadah. P15 dan P16 kemudiannya diserahkan kepada PW6, pegawai penyiasat. Tertuduh kemudian dipertuduh bagi kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan didapati bersalah dan dihukum bawah s. 39B(2) Akta oleh Pesuruhjaya Kehakiman ('PK') di Mahkamah Tinggi. Terkilan, tertuduh merayu. Tertuduh menghujahkan, antara lain, bahawa PK: (i) terkhilaf apabila gagal membangkitkan anggapan bertentangan bawah s. 114(g) Akta Keterangan 1950 terhadap kes pendakwaan kerana gagal memanggil dua saksi material; (ii) gagal mempertimbangkan bahawa terdapat: (a) kelompangan pada rantaian jagaan ekshibit-ekshibit dan ekshibit-ekshibit dadah yang disyaki telah diusik; (b) keraguan berkaitan pergerakan ekshibit-ekshibit dadah yang disyaki yang menjadi hal perkara pertuduhan; dan (c) usikan keterangan jelas yang gagal dijelaskan oleh pendakwaan sepanjang perbicaraan.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman) Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Kedua-dua saksi yang juga bertugas semasa sekatan jalan polis tersebut amat penting dan material untuk kes pendakwaan. Mereka akan dapat memberi penjelasan tentang isu yang berlaku pada semua kotak-kotak yang dirampas dari dalam but teksi pada masa material. Tidak mencukupi bagi pihak pendakwaan untuk hanya menawarkan saksi-saksi tersebut kepada pihak pembelaan. Juga, tiada penjelasan di peringkat pendakwaan mengapa saksi-saksi ini tidak diperolehi atau dipanggil sebagai saksi. Kegagalan memanggil saksi-saksi ini oleh pihak pendakwaan pada peringkat pendakwaan mewujudkan jurang dalam kes pendakwaan yang memudaratkan pertuduhan terhadap tertuduh. Pesuruhjaya Kehakiman seharusnya mengguna pakai anggapan bertentangan bawah s. 114(g) Akta Keterangan 1950 terhadap kes pendakwaan. Pesuruhjaya Kehakiman terkhilaf apabila tidak berbuat demikian.

(2) Walaupun terdapat keraguan mengenai jumlah barang yang dirampas ataupun apa yang hilang, PW6 gagal berbuat penyiasatan mengenai perkara-perkara yang 'hilang' selepas dirampas daripada tertuduh. Oleh itu, tidak munasabah untuk pihak pendakwaan mengemukakan hujahan bahawa tiada apa-apa gangguan pada ekshibit-ekshibit yang dikemukakan di mahkamah. Pesuruhjaya Kehakiman gagal mengambil kira faktor-faktor tersebut yang penting kerana ini menimbulkan keraguan mengenai identiti dadah yang dikemukakan di mahkamah dan terkhilaf dalam tidak mengambil kira jurang yang serius dalam kes pendakwaan. Satu penilaian maksimum keterangan saksi-saksi pendakwaan (PW2, PW4 dan PW6), terutamanya PW4, menimbulkan keraguan mengenai kredibiliti saksi pendakwaan dan keraguan identiti barang kes, yang mengakibatkan pembelaan kes tidak sepatutnya dipanggil.

(3) Fakta bahawa beberapa barang telah hilang menunjukkan bahawa ekshibit-ekshibit telah diusik. Seseorang tidak boleh mengendahkan kehilangan ekshibit-ekshibit dan membuat dapatan bahawa P15 dan P16 tidak diganggu. Rantaian jagaan ekshibit-ekshibit telah dipersoalkan dan integriti kandungan P15 dan P16 telah dikompromi, menunjukkan bahawa kedua-duanya mungkin diusik. Jelas sekali, PK terkhilaf dalam memutuskan bahawa tiada kelompangan pada rantaian penjagaan ekshibit-ekshibit.

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Regina v. Spurge [1961] 3 WLR 23 ***(refd)***
Sun Kam Heng v. PP [1993] 1 CLJ 109 SC ***(refd)***
Tan Thang Sang v. PP [1973] 1 LNS 158 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Evidence Act 1950, ss. 114(g), 137

For the appellant - Kit Soon Fong & Chew Jee San; M/s Kit & Assocs
For the respondent - Ahmad Sazilan Abdul Khairi; DPP

[Editor's note: Appeal from High Court, Alor Setar; Criminal Trial No: 45A-28-2013 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] This is an appeal by the appellant (accused) against the decision of the learned Judicial Commissioner in convicting the accused of an offence under s. 39B(1)(a) and sentencing him under s. 39B(2) of the Dangerous Drugs Act 1952.

[2] After hearing submissions from both parties and perusing through the appeal records, we found merits in the appeal. Unanimously, we allowed the appeal. The conviction and sentence was set aside. The accused is accordingly acquitted and discharged. Herein below are our grounds.

Background

[3] On 12 December 2012, at or around 10.30pm, Sargeant Mohd Yusof bin Ismail (PW2) was on duty as supervisor in a police road block at Jalan Alor Merah towards Alor Setar, Kedah. At the material time PW2 was with six other police personnel, including Constable Mohd Izzwan bin Mohd Isa (PW4).

[4] At the said police road block, Constable Awang Hasbi bin Awang Sabree detained a taxi, registration no KAQ 3917 which was driven by PW9. At the material time the accused (who was an Iranian) was a passenger in the taxi at the back seat. The taxi was ordered to stop at the side of the road. PW2 directed PW4 and Constable Sivanesan a/l Supramaniam to inspect the taxi.

[5] PW 4 then called upon PW2 and informed PW2 that he found two boxes of "Kellogs Cornflakes" boxes (P15 and P16) which were wrapped in cellotape in a trolley bag (P19) in the boot of the taxi. At that time the distance between PW2 and PW4 was about 5 metres. PW2 then went over to PW4 to inspect the two "Kellogs Cornflakes" boxes found.

[6] When PW4 was holding the "Kellogs Cornflakes" box (P15), the accused snatched the "Kellogs Cornflakes" box (P15) from PW4. The accused slit opened the cellotape of P15 using a key (P28). The accused then put his hand into P15 and took out what appeared to be substances in the

form of crystals and put it into his mouth whilst saying "eat sugar, eat sugar". PW4 tasted the contents of P15, however found it to be bitter and suspected that it was drugs. It was in evidence that the accused could not converse well in English.

[7] Another bag (P18) was found in the boot of the taxi. Nothing incriminating was found in P18. A laptop (P21) was found in the back seat of the taxi.

[8] The accused and the items seized (P15, P16, P19 and P21) were brought to the Police Station Kepala Batas at 11pm by PW4 together with Constable Mohd Akmal bin Abdul Nasir, whilst PW2 remained manning the police road block until 11.20pm.

[9] Since the police personnel involved in the detention of the accused were inexperienced in detention and seizure of drugs, the Head of Police Station, Kepala Batas (PW3) contacted the Department of Narcotics IPK, Kota Setar, Kedah to get help as to what is the course of action that needed to be done.

[10] Inspector Farouk Fasha bin Bashah (PW5) and his team came over to the Police Station, Kepala Batas from the Department of Narcotics IPK Kota Setar. PW5 inspected the contents of P15 and P16 and suspected that it was drugs. PW5 then directed that the accused and the items seized to be sent to IPD, Kota Setar for further investigation.

[11] PW2 closed back the top part of P15 (which was opened earlier). He then handed P15 and P16 over to PW4 to be taken to IPD Kota Setar. PW4 together with Constable Sutay Raghuwan, Constable Awang Hasbi brought the accused and the items seized to IPD Kota Setar, whilst PW5 followed from behind, in another vehicle.

[12] According to PW4, at IPD Kota Setar, P15 and P16 were placed on the floor supervised by Konstable Sutay Raghawan. It was in IPD Kota Setar that P15 and P16 were handed over to the investigating officer (PW6).

Accused's Ground Of Appeal

[13] The accused submitted that the learned Judicial Commissioner erred in law and fact when he failed to make a finding on the credibility of material prosecution witnesses which was clearly compromised.

[14] The learned Judicial Commissioner erred when he failed to invoke the adverse presumption under s. 114(g) of the Evidence Act 1950 against the prosecution's case for failure to call material witness ie, Constable Mohd Akmal bin Abd Nasir and Constable Sivanesan a/l Subramaniam.

[15] Further, it was submitted that the Judicial Commissioner misdirected himself when he failed to appreciate that there are serious doubts relating to the identity of the drugs exhibits. The learned Judicial Commissioner ought to have held that the prosecution had failed to prove its case beyond reasonable doubt at the conclusion of the trial for the following reasons:

(i) there is a break in the chain of custody of the suspected drug exhibits and the suspected drug exhibits have been tampered with;

(ii) there are doubts relating to the movement of the suspected drug exhibits which form the subject matter of the charge; and

(iii) there is clear tampering of evidence which the prosecution failed to explain throughout the trial.

Findings

[16] The defence submitted that the learned Judicial Commissioner erred when he ruled that there was no break in the chain of evidence despite acknowledging the existence of serious infirmities in the chain of custody of items seized, in his grounds of judgment at p. 147.

[17] It has been suggested by the defence counsel at the prosecution case that there were more than two boxes seized from the accused, at the time of his arrest. What was tendered in court was only two boxes (P15 and P16) which allegedly contained drugs, which is the subject of the charge against the accused. The learned Judicial Commissioner found that PW2 had admitted in evidence that he did not see the number of boxes seized from the accused, however PW2 was aware that there were two other boxes seized from the accused and that there had been disciplinary action instituted against PW4 and Constable Sivanesan a/l Subramaniam, ie, the police personnel who were on duty at the road block at the material time for taking these other two boxes.

[18] The learned Judicial Commissioner in his grounds of judgment stated that he had considered the evidence of the prosecution witnesses in relation to the handling of the exhibits concerned and was of the view that there was no break in the chain of evidence of the same. At p. 146 of his judgment in appeal record vol. 2, the learned Judicial Commissioner said that P15 and P16 were seized by PW4 and it was the same P15 and P16 which were brought to the Police Station Kepala Batas, subsequently brought to IPK Kota Setar and finally handed over to PW6, the investigating officer. Hence, the learned Judicial Commissioner found that, as far as the two boxes (P15 and P16) are concerned, there is no doubt that the accused was in custody and control of them. He concluded that, from the evidence of PW2, PW4, PW6 and PW1, there has been no break in the chain of custody of the

exhs. P15 and P16, which led to his findings that the prosecution has proven its case of custody and control of these two boxes which were confirmed to contain the drugs, of which the accused has knowledge of. The relevant part of the judgment reads (appeal record vol. 2 at p. 145):

> SP2 mengakui dia tidak melihat jumlah kotak yang telah dirampas dari Tertuduh tetapi mengakui dia tahu terdapat dua lagi kotak lain dan tindakan disiplin telah diambil terhadap SP4 dan seorang lagi anggota pasukan sekatan jalan raya (Konstabel Siva) kerana mengambil dua kotak lain tersebut.
>
> Saya juga telah pertimbangkan keterangan saksi-saksi pihak pendakwa mengenai pengendalian barang kes tersebut. Saya dapati berasaskan keterangan mereka tidak terdapat pemutusan rantaian keterangan dalam pengendalian barang kes yang terlibat.
>
> …
>
> Berdasarkan keterangan SP2, SP4, SP6 dan SP1 saya dapati keterangan yang dikemukakan menunjukkan tidak ada pemutusan rantaian keterangan tentang pengendalian barang kes setakat yang berkait dengan kandungan P15 dan P16 … Saya berpuas hati P15 dan P16 telah dirampas dari Tertuduh dan telah dijalankan analisis oleh SP1 dan barang yang sama juga telah dikemukakan di hadapan saya.

[19] A perusal of the evidence of the investigating officer, PW6, shows that several police personnel who were involved in the road block on 12 December 2012 have been suspended from official duty as a result of the present case. Reason being there were more than two boxes seized from the accused from the boot of the taxi at the time of the road block, but only two boxes were handed to the investigating officer. The allegation against them was that they have taken the "missing" boxes.

[20] PW2 in his evidence acknowledged that a total of seven officers were arrested and later charged under the Dangerous Drugs (Special Preventive Measures) Act 1985 for failure/tampering with the custody, control and management of the exhibits.

[21] PW2 further said in evidence that disciplinary action was also taken against him for failure to supervise his staff in the management of drugs exhibits. In cross-examination of PW2, (which was not rebutted) he agreed that there were more than two boxes seized from the accused and that he has no idea what happened to those missing boxes. PW2 also agreed in cross-examination that the items seized from the boot of the taxi was not supervised the whole time after it was seized at the road block. PW2 had directed Constable Izzwan Md Isa (PW4) and Constable Akmal bin Abdul Nasir to keep watch over the seized items. However, subsequently it was found that these police personnel had taken some of the exhibits and sold it in open market.

[22] PW4 was called as a witness by the prosecution and his evidence was that, apart from some clothes and the two boxes found from the boot there were nothing else (refer to p. 63 of the record of appeal vol. 1).

From the evidence, Constable Akmal bin Abdul Nasir and Constable Sivanesan a/l Subramaniam were also with PW4 at the road block when they seized the boxes from the accused, however Constable Akmal bin Abdul Nasir and Constable Sivanesan a/l Subramaniam were not called to support PW4's evidence with regards to what was actually seized.

[23] It is trite law that, where the evidence of a witness does not require to be corroborated in law, there is no need to tender corroborative evidence to support his testimony in court. Such requirement would be in conflict with s. 137 of the Evidence Act 1950. This has been illustrated in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 where it been held that:

> Where the evidence of a witness does not require to be corroborated in law, there is no obligation to tender corroborative evidence to support his testimony. Thus, if the case for the prosecution rests solely on the evidence of one witness in such a category there is no requirement in law for his evidence to be corroborated. Any such requirement will conflict with section 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This mean that the testimony of a single witness, if believe, is sufficient to establish any fact.

However, as far as the present case is concerned, there is doubt as to how many boxes were seized by the police from the accused at the time of the road block.

[24] Throughout the trial, the prosecution has led evidence that PW4, Constable Mohd Akmal bin Abdul Nasir and Constable Sivanesan a/l Subramaniam escorted the accused together with the suspected drugs exhibits to the Kepala Batas Police Station. The accused has challenged the prosecution's version of events and suggested that Constable Akmal bin Abdul Nasir and Constable PW4 have tampered with the suspected drug exhibits when asked to escort the same to Kepala Batas Police Station. This can be seen in cross-examination of PW2 at pp. 37-38 of the record of appeal vol. 1 which reads:

> Q: Mengambil kira jawapan kamu tadi, saya cadangkan bahawa terdapat lebih dari 2 bungkusan berisi bahan disyaki dadah dari beg-beg tersebut?
>
> A: Setuju.
>
> Q: Pada hal kamu tahu hasil siasatan dalam beg-beg tersebut ada lebih dari 2 kelogg Cornflakes box?
>
> A: Setuju.

Q: Setuju kamu tidak boleh memastikan apa yang terjadi pada kotak yang hilang tersebut? A

A: Setuju.

Q: Saya cadangkan bahawa barang kes yang dijumpai dalam boot tidak dikawal pada bila-bila masa selepas ia dirampas di kawasan roadblock ke Balai Polis Kepala Batas oleh kamu? B

A: Setuju.

Q: Barang-barang kes terutama 2 kotak kelogg cornflakes itu berada dalam milikan anggota-anggota kamu?

A: Setuju. C

Q: Siapa yang jaga barang kes?

A: Saya arahkan jaga barang kes dari tempat road block ke Balai Kepala Batas ialah Konst. Izzuan dan Konst. Akmal.

Q: Jika dari mana-mana dari mereka atau kedua-dua mereka mengganggu barang kes kamu tidak tahu kerana bukan dalam kawalan kamu? D

A: Setuju.

The defence has suggested that there were more than two boxes seized from the accused and PW4 insisted that they only seized two boxes and in cross-examination, he denied vehemently that there were more than two. E

[25] Since PW2 and PW6 have confirmed that there were missing exhibits, and that several police personnel have been suspended from duty in relation to the "missing exhibits", then PW4 was not telling the truth as to the number of boxes seized on that day. Hence PW4's credibility left much to be desired here. This aspect of the evidence of the prosecution witnesses was never considered by the learned Judicial Commissioner. There was no proper evaluation by the learned Judicial Commissioner on the testimony of the prosecution witnesses *vis-a-vis* PW2, PW4, PW6. Therefore, the findings of the learned Judicial Commissioner that "Berdasarkan keterangan SP2, SP4, SP6 … saya dapati keterangan yang dikemukakan menunjukkan tidak ada pemutusan rantaian keterangan tentang pengendalian barang kes setakat yang berkait dengan kandungan P15 dan P16 …" is erroneous. It was a general all encompassing findings without any proper judicial analysis of the credibility of each of the witnesses to the issues raised by the defence ie, the break in the chain of custody of the exhibits and the tampering of the same by the police personnel at the road block. F G H

[26] The prosecution had offered these two witnesses (Constable Akmal bin Abdul Nasir and Constable Sivanesan a/l Subramaniam) to the defence at the close of the prosecution's case. However, in view of the doubt created as to how many boxes were seized from the accused, these two witnesses, who I

were also on duty at the police road block, are crucial and material for the prosecution's case. They would be able to shed light on the issue of what happened to all the boxes of items seized from the boot of the taxi at the material time. It is insufficient for the prosecution to just offer them to the defence. In addition, there was no explanation at the prosecution's stage as to why these witnesses were not available or called as a witness. Failure to call these witnesses by the prosecution at the prosecution stage itself, creates gaps in the prosecution's case which is fatal to the charge against the accused (Refer to *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16).

[27] Consequently, the learned Judicial Commissioner should have invoked an adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution's case ie, that, these witnesses if called would tender evidence which is against the prosecution. The learned Judicial Commissioner erred when he did not do so.

[28] It is unclear who exactly had custody and control of the drugs from the moment they were seized at the police road block, at the Police Station Kepala Batas, at the IPD Kota Setar and until finally it was handed over to PW6, the investigating officer. PW4 in his evidence was not sure who was involved in taking out the items seized from the accused, out of the boot of the taxi. Refer to notes of evidence at p. 63 appeal record vol. 1 which reads:

> Q: Siapa yang ambil keluar semua kandungan dari dalam boot?
>
> A: Sjn, saya dan lagi tidak ingat, angkat dan pindah ke boot MPV.

[29] Throughout the trial, the prosecution has led evidence that PW4, Constable Mohd Akmal bin Abdul Nasir and Constable Sivanesan a/l Subramaniam escorted the accused together with the suspected drugs exhibits to the Kepala Batas Police Station. The accused has challenged the prosecution's version of events and suggested that Constable Akmal bin Abdul Nasir and PW 4 have tampered with the suspected drug exhibits when asked to escort the same to Kepala Batas Police Station. This can be seen in cross-examination of PW2 at pp. 37-38 of the record of appeal vol. 1 which reads:

> Q: Mengambil kira jawapan kamu tadi, saya cadangkan bahawa terdapat lebih dari 2 bungkusan berisi bahan disyaki dadah dari beg-beg tersebut?
>
> A: Setuju.
>
> Q: Pada hal kamu tahu hasil siasatan dalam beg-beg tersebut ada lebih dari 2 kelogg Cornflakes box?
>
> A: Setuju.
>
> Q: Setuju kamu tidak boleh memastikan apa yang terjadi pada kotak yang hilang tersebut?

A: Setuju.

Q: Saya cadangkan bahawa barang kes yang dijumpai dalam boot tidak dikawal pada bila-bila masa selepas ia dirampas di kawasan roadblock ke Balai Polis Kepala Batas oleh kamu?

A: Setuju.

Q: Barang-barang kes terutama 2 kotak kelogg cornflakes itu berada dalam milikan anggota-anggotra kamu?

A: Setuju.

Q: Siapa yang jaga barang kes?

A: Saya arahkan jaga barang kes dari tempat road block ke Balai Kepala Batas ialah Konst. Izzuan dan Konst. Akmal.

Q: Jika dari mana-mana dari mereka atau kedua-dua mereka mengganggu barang kes kamu tidak tahu kerana bukan dalam kawalan kamu?

A: Setuju.

[30] PW4 in his evidence when cross-examined said that when he arrived at the police station at Kepala Batas, he placed the two boxes which he had seized from the accused on "kaunter pertanyaan." After that he went out to take the bags (refer to pp. 64 and 65 of the record of appeal).

[31] Subsequently PW4 and his team met with PW3 and later PW5 (Inspector Farouk). Then PW4 was instructed to take the accused and the exhibits to the investigating officer, PW6 at the Narcotics Department at IPD Kota Setar. (Examination-in-chief of PW3 at pp. 48 vol. 1 of the record of appeal)

[32] There was also uncontroverted evidence from cross-examination of PW4 that several police personnel of the Narcotics Department of Kepala Batas and/or IPD Kota Setar had physically handled or examined the Kellogs Cornflakes boxes. (refer to p. 65 vol. 1 of record of appeal) when PW4 said he saw "anggota-anggota narkotik periksa balik beg itu dan buka kotak-kotak."

[33] In addition, there is the evidence from the investigating officer (PW6) who said that:

> Dimaklumkan pegawai tatatertib yang menyiasat kes anggota tersebut, dimaklumkan barang kes yang dijumpai semasa di tempat kejadian telah hilang sejumlah dari barang kes yang dirampas. Berapa jumlah tidak dimaklumkan. Tidak dijelaskan bentuk barang yang hilang pada malam itu.

Despite doubts as to how many items seized were missing or what was missing, PW6 failed to do any investigation on the items that were "missing" after it was seized from the accused. Hence it is incredible as to how the

A prosecution can submit that there has not been any tampering in the exhibits tendered in court. Moreover, PW6 was also unable to confirm what was the nature of the items that went missing. This part of the evidence of PW6 was not considered by the learned Judicial Commissioner. This issue on the tampering and missing exhibits has been raised from the initial stage of the
B prosecution's case, it is thus incumbent upon the prosecution to disprove such notions (See *Tan Thang Sang v. PP* [1973] 1 LNS 158; [1975] 1 MLJ 204, at p. 206; *Regina v. Spurge* [1961] 3 WLR 23). It cannot be brushed aside and totally ignored, as what had happened in the present case.

[34] The learned Judicial Commissioner failed to take into account the
C aforesaid factors which are crucial as it raises doubts on the identity of the drugs that were finally produced in court and erred in not taking into account the serious gaps in the prosecution's case. A maximum evaluation of the testimony of the prosecution's witnesses (PW2, PW4 and PW6) especially PW4 creates doubt on the credibility of the prosecution's witnesses and
D doubts on the identity of the exhibits, of which defence of the case should not have been called in the first place. Edgar Joseph Jr SCJ in *Sun Kam Heng v. PP* [1993] 1 CLJ 109 enunciated the principle that when there are doubts as to the identity of the exhibits, the conviction should be set aside, his judgment can be found at p. 113 of the report:

E > For the reasons stated, although it was utterly regrettable that the appellant should succeed in his appeal, the principle involved was more important than the case itself, and so, with considerable regret, we had no option but to allow the appeal, quash the convictions, set aside the sentences and record orders of acquittal and discharge. The Public Prosecutor will, no doubt, exercise his own discretion as to what action
F > he thinks fit to take.

Conclusion

[35] From the aforesaid, the learned Judicial Commissioner erred when he failed to give a maximum evaluation of the testimony of the prosecution
G witnesses especially PW2, PW4 and PW6 at the end of the prosecution's case.

[36] One cannot discount the missing exhibits and concluded that P15 and P16 were not tampered with. The fact that some of the items were missing suggests that the exhibits have been tampered with. The chain of custody of
H the exhibits have been questioned and the integrity of the contents of P15 and P16 have been compromised, indicating that it could have been tampered with. Clearly, the learned Judicial Commissioner has erred in his findings that there was no break in the chain of custody of the exhibits.

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[37] The failure to call certain witnesses created material gaps and doubts in the prosecution's case which is fatal to the prosecution's case and an adverse inference under s. 114(g) should have been invoked against the prosecution's case.

[38] We unanimously found that it was unsafe to retain the conviction of the accused. Unanimously, we allowed the appeal. The conviction and sentence was thereby set aside. The accused is acquitted and discharged.